Rayanold Pereira a/l HB Pereira v Shaila Marina Fidelis Pereira

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–145 OF 1998
KAMALANATHAN RATNAM J
25 AUGUST 1998

Civil Procedure *— Contempt of court — Breach of court order — Whether alleged contemnor could be heard before he had purged the contempt so long there were facts that prima facie demonstrated the contempt*

The plaintiff obtained court orders ('the orders') against the defendant to have custody, control and care of the children of the marriage. The plaintiff then applied for leave to commit the defendant to prison for breaching the orders. In the meantime, the defendant had filed an application to set aside the orders. The plaintiff raised a preliminary objection that a party in contempt cannot and ought not to be heard until she has purged her contempt. It was argued that there was no need for an order for committal first, so long as there were facts before the court that prima facie demonstrated that the defendant was considered to be in contempt.

Held, dismissing the preliminary objection:

Whilst there is a general rule that a party in contempt in a proceeding ought not to be heard on an application made for her own benefit in the same proceedings unless and until she has purged her contempt, there is a clear exception to this rule where the same application is made with cogent affidavit evidence to challenge the very order, the disobedience of which had made her liable in contempt. Since whether to allow the purging of the contempt or to allow the hearing of the application is a matter of judicial discretion, the court found the scales of justice tilting in favour of the defendant, and thus the court must hear her application to set aside first. Moreover, there was doubt in this case as to whether there was indeed a breach of the orders and it would not be just to order the defendant to purge the contempt before the court heard her application to set aside the orders (see pp 767B–C, I and 768A–B).

[Bahasa Malaysia summary

Plaintif telah memperolehi perintah-perintah mahkamah ('perintah tersebut') terhadap defendan untuk mendapatkan kawalan dan jagaan anak-anak hasil perkahwinan. Plaintif kemudiannya memohon kebenaran agar defendan dipenjarakan kerana melanggar perintah tersebut. Sementara itu, defendan telah memfailkan suatu

permohonan untuk mengetepikan perintah tersebut. Plaintif membangkitkan bantahan permulaan bahawa pihak yang menghina tidak boleh dan tidak patut didengar sehingga ia telah membersihkan penghinaannya. Adalah dihujahkan bahawa tiada keperluan untuk satu perintah komital dahulu, asalkan terdapat fakta-fakta di hadapan mahkamah yang menunjukkan secara prima facie bahawa defendan dianggap telah menghina.

Diputuskan, menolak bantahan permulaan:

Manakala terdapat rukun am bahawa sesuatu pihak yang menghina dalam prosiding tidak seharusnya didengar atas permohonan yang dibuat untuk manfaatnya sendiri dalam prosiding yang sama melainkan dan sehingga ia telah membersihkan penghinaannya, terdapat suatu kekecualian yang jelas kepada rukun ini di mana permohonan yang sama dibuat dengan keterangan afidavit yang meyakinkan bagi mencabar perintah tersebut, yang mana keingkaran telah menyebabkannya bersalah atas penghinaan. Oleh kerana sama ada untuk membenarkan pembersihan penghinaan atau untuk membenarkan pembicaraan permohonan merupakan perkara yang berdasarkan budi bicara kehakiman, mahkamah mendapati pencapaian keadilan memihak kepada defendan, dan justeru itu mahkamah mestilah mendengar permohonannya untuk mengetepikan dahulu. Tambahan pula, terdapat keraguan dalam kes ini mengenai sama ada memang berlakunya kemungkiran perintah tersebut dan adalah tidak adil untuk memerintahkan defendan membersihkan penghinaan sebelum mahkamah mendengar permohonannya untuk mengetepikan perintah tersebut (lihat ms 767B–C, I dan 768A–B).]

Notes

For cases on contempt of court, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1083–1166.

Case referred to

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217 (refd)

Legislation referred to

Companies Act 1965 Form 49
Rules of the High Court 1980 O 52 r 2(2)

Mark Ho (*Chellam Wong*) for the applicant/defendant.
YN Foo (*YN Foo & Partners*) for the respondent/plaintiff.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff husband filed an originating summons to have, inter alia, custody, control and care of the three children of the marriage. He named his wife as the defendant.

He then took out an ex parte application and prayed for the same orders that he had asked for in the originating summons, namely that:

(1) he be given custody, care and control of the three children of the marriage;

(2) the wife do surrender to him the two younger children he had named;

(3) the wife be prevented from removing the three children of the marriage from out of the jurisdiction of the court; and

(4) costs and any other relief the court finds just and reasonable.

On 26 February 1998, I granted an order in terms of the ex parte summons in chambers. On 17 March 1998, the plaintiff obtained leave from the deputy registrar to serve the originating summons by way of substituted service. On 4 May 1998, I granted the plaintiff the same orders that I had granted by way of ex parte on 26 February 1998. On 17 July 1998, the plaintiff applied for leave to commit the defendant to the civil prison for breaching the order of court dated 4 May 1998.

In the meantime, the defendant had filed an application (encl 13) on 8 July 1998 to set aside the orders dated 25 February 1998 (should be 26 February 1998) and 4 May 1998 or an alternative prayer to vary the order dated 4 May 1998.

The preliminary objection

Enclosure 13 came up for hearing on 21 July 1998 and Ms YN Foo for the plaintiff raised a preliminary objection, having first given notice of her intention to raise this objection.

Relying on the (then) Supreme Court decision of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 (SC), the plaintiff submitted that a party in contempt cannot and ought not to be heard until she has purged her contempt. Arguing that there is no need for an order for committal first, the plaintiff contended that so long as there are facts before the court that prima facie demonstrated that the defendant was considered to be in contempt, she ought not to be heard until she had purged the contempt.

The plaintiff referred to encl 2, his affidavit in support of the originating summons, wherein he had stated that he had not seen his two younger children since November 1997. He also stated that the elder of the two children with the defendant was no longer in school in Kuala Lumpur and

he exhibited a letter from the headmistress to state that the defendant had taken the child away from school for good after the child had completed its first year of schooling.

In his affidavit in support of the application for substituted service (encl 7), the plaintiff averred that the defendant had run away from the matrimonial home since 21 November 1997. The plaintiff averred that the defendant had taken the younger two children with her, whilst leaving the eldest child with him.

Findings of the court

In her application to set aside the two orders (encl 13) the defendant had stated her address as 'Victoria Grande', No 1, Jalan 5/4G, Jalan Tanjung, 46000 Petaling Jaya, Selangor. She has maintained that that has been her address. I also notice that the address as stated by both the plaintiff and the defendant in Form 49 of the Companies Act 1965 being the return of the allotment of shares, is the same address as stated by the defendant earlier. I also note that in encl 18, which is a statement pursuant to O 52 r 2(2) of the Rules of the High Court 1980, and which statement is a prerequisite to support the application for leave to commit, the plaintiff has stated that the defendant is residing at No 37, Jalan Sentosa Desa, Taman Desa, off Jalan Klang Lama, Kuala Lumpur. The plaintiff has merely stated that due to his continuing queries, the police helped him trace the defendant to the said house. I note that in three affidavits filed, namely encls 16, 12 and 11A, the defendant has given her address as 'Victoria Grande' as stated earlier. In fact in encl 16 she has even annexed as an exhibit a photostat copy of her identity card which clearly states her address as at 'Victoria Grande', as stated earlier.

The plaintiff in his affidavit in reply, encl 20, has denied that the defendant is living at 'Victoria Grande' which he contends he purchased in the joint names of himself and the defendant. He has averred that the said house is presently rented out to Japanese expatriates. Yet the plaintiff did not consider it relevant to either exhibit a copy of a receipt issued towards the rental nor cause the tenant to either affirm an affidavit or tender a letter to that effect, more so when he is expressly challenging the contention of the defendant that that is her address.

One other matter that gives me cause for concern is the fact that the plaintiff had failed to state any address of the defendant in the originating summons or in his affidavit in support. Further encl 6 is the affidavit of Ms Foo, counsel for the plaintiff, filed in support of the ex parte application for leave to serve the inter partes originating summons upon the defendant. Even this affidavit does not state any address where attempts were made to effect service on the defendant. However, reference is made to an affidavit (encl 7) affirmed by the plaintiff wherein the plaintiff states that since the defendant had run away with the children from the matrimonial home on 21 November 1997 he has not been able to ascertain the place of residence of the defendant. However, nowhere in any of his affidavits has the plaintiff stated the address of his matrimonial home. Further in that same

affidavit the plaintiff has averred that he had met the defendant three times at the Sacred Heart Church in the presence of a priest, Rev Father John Nyanapragasam to try and resolve matters between them. Whilst he averred that he was never given the defendant's address he did not categorically affirm that he had asked the defendant for her address during the three meetings and that she had refused to divulge her address. In the circumstances, I have grave doubts as to the service of the originating summons upon the defendant. Since a nagging doubt has arisen it would not be just to order the defendant to purge the contempt before I hear her application to set aside the ex parte order and the inter partes order I had made at the behest of the plaintiff.

It is clear from *Wee Choo Keong* that it is a matter of discretion, depending on the circumstances of the case, whether or not a litigant ought to be heard, notwithstanding his contempt. The Supreme Court has held that where the litigant shows herself to have little or no regard for an order issued against her, then she has, to an extent, forfeited her rights to be heard or at least postponed that right until she has suitably purged her contempt.

In this case, the plaintiff himself has averred that as of November 1997 he had not seen his wife and children. In fact the plaintiff himself exhibited a letter from the headmistress stating that on 5 February 1998 the defendant had taken the child and her records from the school and that there was no request for a change of school. Whilst the defendant herself has not categorically stated when she took the two younger children abroad, she has averred that the two children are living with and are being taken care of by her 'very dear and trusted friends' who are documented in the children's school application forms as their guardians. I can only conclude that she must have taken the two children abroad any time after 5 February 1998 when she took the elder of the two from the school. I had granted the inter partes order on 4 May 1998. There is no affidavit of service to show when the order dated 4 May 1998 was served on the defendant. In any case I also have doubts as to whether the children were actually taken abroad after I had given the orders. I must be fully satisfied that the defendant is in breach of my order. I can only be thus satisfied if I hear her application to set aside the order. Unlike the case of *Wee Choo Keong*, where the Supreme Court held that the trial judge had accepted that there was a prima facie case for contempt, I have voiced my doubts in this case as to whether there is indeed a breach of my orders.

Numerous cases were cited by learned counsel for the plaintiff which suggest that a party guilty of contempt should not be heard on an application made on her part to a court where she is considered to be prima facie in contempt such as when the court can see that she has disobeyed its order. I do not intend to refer to those cases as they are not applicable in this case.

It is my judgment that whilst there is a general rule that a party in contempt in a proceeding ought not to be heard on an application made for her own benefit in the same proceedings unless and until she has purged her contempt, there is a clear exception to this rule where the same

application is made with cogent affidavit evidence, to challenge the very order, the disobedience of which had made her liable in contempt. Since whether to allow the purging of the contempt or to allow the hearing of the application is a matter of judicial discretion, I find the scales of justice tilting in favour of the defendant, and thus I must hear her application to set aside first.

Accordingly, I dismiss the plaintiff's preliminary objection with costs and order that encl 13 — that is, the application to set aside the ex parte and the inter partes orders dated 26 February 1998 and 4 May 1998 — be heard first.

Preliminary objection dismissed.

Reported by Jafisah Jaafar

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